Supreme Court, U.S.
FILED
07-865 OCT 6 - 2007
OFFICE OF THE CLERK

*In the*

SUPREME COURT OF THE UNITED STATES

---

John N. Sweeney

*Petitioner,*

v.

Commissioner of Internal Revenue

*Respondent.*

---

On Petition for Writ of Certiorari
to the United States Court of Appeals for
the Elenenth Circuit

---

# WRIT OF CERTIORARI

---

John N. Sweeney
8184 Belford Way
Melbourne, Florida 32940
321-253-2918

# QUESTIONS PRESENTED

1. Is the Internal Revenue Service required have to display compliance with the Paperwork Reduction Act of 1995 on all of its request for income tax information forms pursuant to 44 U.S.C. § 3506(c)(1)(B) before it can subject a Taxpayer to any penalty for failure to timely provide answers to the questions sought on a particular form?

2. Is the holding by the United States Court of Appeals for the Eleventh Circuit in *U.S. v. Neff*, 954 F. 2d 698, 699-700 (11th Cir. 1992) contrary to this Court's decision in *Dole v. United Steelworkers*, 494 U.S. 26 (1990) which held typical information collection requests such as Form 1040 are subject to the protection of the Paperwork Reduction Act?

3. If the Internal Revenue Service does not comply with the Paperwork Reduction Act of 1995 an *d person raises the* protection provided by 44 U.S.C. § 3512(b)(1995) in an administrative hearing and on appeal from the determination of that hearing, is it a frivolous claim of protection and not worthy of somber reasoning and copious citation of precedent?

4. Is raising the protection provided by 44 U.S.C. § 3512(b)(1995) against claims of subjecting Petitioner to additional penalties for failure to comply with requests made by the Internal Revenue Service on Form 1040, a claim

justifying imposition by the United States Tax Court of even more penalties in the amount of $ 10,000 pursuant to 26 U.S.C. § 6673?

## PARTIES TO THE PROCEEDING

The caption does contains the names of all parties in the case below.

TABLE OF CONTENTS

OPINIONS BELOW.....1

STATEMENT OF JURISDICTION.....2

CONSTITUTION AND STATUTORY PROVISIONS.....2

STATEMENT OF THE CASE.....2

REASONS FOR GRANTING WRIT TO CIRCUIT.....4

1. Is the Internal Revenue Service should be held to display compliance with the Paperwork Reduction Act of 1995 on all of its request for income tax information forms pursuant to 44 U.S.C. § 3506(c)(1)(B) before it can subject a Taxpayer to any penalty for failure to timely provide answers to the questions sought on a particular form.....5

2.. Is the holding by the United States Court of Appeals for the Eleventh Circuit in *U.S. v. Neff*, 954 F. 2d 698, 699-700 (11th Cir. 1992) contrary to this Court's decision in *Dole v. United Steelworkers*, 494 U.S. 26 (1990) which held typical information collection requests such as Form 1040 are subject to the protection of the Paperwork Reduction Act?.....8

3 If the Internal Revenue Service does not comply with the Paperwork Reduction Act of 1995 and a person raised the protection provided by 44 U.S.C. § 3512(b)(1995) in an

administrative hearing and on appeal from the determination of that hearing, cannot be a frivolous claim of protection and is worthy of somber reasoning and copious citation of precedent.....12

4. Is raising the protection provided by 44 U.S.C. § 3512(b)(1995) against claims of subjecting Petitioner to additional penalties for failure to comply with requests made by the Internal Revenue Service on Form 1040, is not a claim justifying imposition by the United States Tax Court of any penalty pursuant to 26 U.S.C. § 6673?.....16

5. CONCLUSION.....18

APPENDIX

Determination.....App.1

Tax Court Memorandum.....App.9

Tax Court Decision.....App.18

Panel Decision .....App.20

Order deny Petition for Rehear and Rehear En Banc

.....App.21

TABLE OF AUTHORITIES

*Dole v. Un. Steelworkers*, 494 U.S. 26,43 (1990)1,5,9,14

*CIR v. Lane-Wells Co.*, 321 U.S. 219, 223 (1944).....10

*Cheek v. U.S.*, 498 U.S. 192, 199-200 (1991) .....10

*Pond v. CIR*, T.C. Memo 2005-255, WL 18928 decided 10911-02 (10th Circuit 1-4-07)(unpublished) ....5

*U.S. v. Collins*, 920 F.2d 619, 630-31 in footnote 12...14

*U.S. v. Hubbell*, 530 U.S. 27, 35 (2000).....10

*U.S. v. Neff*, 954 F.2d 698 (11th Cir. 1992).....8

*Otte v. U.S.*, 419 U.S. 43, 52 (1974) .....10

*USA v. Chisum*, 06-7082 at 12 (slip op.)(decided 9-26 -07)(10th Cir.).....6

STATUTES INVOLVED

26 U.S.C. § 6001.....10

26 U.S.C. § 6011.....10

26 U.S.C. § 6012.....10

26 U.S.C. § 6330.....3

26 U.S.C. § 6673.....15,16

26 U.S.C. § 7491.....11

44 U.S.C. § 3506(c)(1)(b)..... .....4,6,15

44 U.S.C. § 3507.....15

44 U.S.C. § 3512.....3,5,11,15,16,17

## PETITION FOR WRIT OF CERTIORARI

Petitioner John N. Sweeney respectfully requests that a writ of certiorari be issued to the United States Court of Appeals for the Eleventh Circuit to set aside a Panel decision to summarily affirm a decision by the United States Tax Court which held that raising the protection provided by 44 U.S.C. § 3512(1995) is sanctionable and frivolous. The Tax Court decision is in opposition to this Court's decision in *Dole v. United Steelworkers*, 494 U.S. 26 (1990) and the Tenth Circuit's recent decision such claims are not frivolous in *Pond v. CIR*, T.C. Memo 2005-255, WL 18928 decided 10911-02 (10th Cir.1-4-07)(unpublished) The Tenth Circuit on September 26, 2007 in USA v. Chisum 06-7082, decided that the 1040 Form is subject to the PRA and that protection reaches claims of failure to file returns out of compliance with the PRA. None of the orders mention the PRA in any manner.

## OPINIONS BELOW

The decision of the United States Tax Court was entered on October 10, 2006. The Panel decision was entered May 18, 2007. The Order denying rehearing

and rehearing en banc was issued July 9, 2007.

## STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was final July 9, 2007.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTION AND STATUTES

At issue is the Paperwork Reduction Act of 1995, Internal Revenue Restructuring and Reform Act of 1998, as well whether penalties under 26 U.S.C. § 6673 are penalties subject to the Paperwork Reduction Act of 1995 as that term is defined at 44 U.S.C. § 3502(14).

The Collection Due Process Provision, 26 U.S.C. § 6330 and the Public Protection Provision, 44 U.S.C. § 3512, are at the center of this controversy.

## STATEMENT OF THE CASE

On April 15, 2000, 2002 and 2003 for the Calender Year 1999, 2001 and 2002, Petitioner did not provide any answers to any questions on the request Form 1040 propounded by the Internal Revenue Service making the request. All income was reported by the entity tendering payment to Petitioner on one

IRS form or another.

On March 28, 2005, Petitioner received a Notice of Levy and a Notice of his Right to a Collection Due Process Hearing involving taxes, additional penalties and interest, stemming from Petitioner's refusal to answer the Commissioner's questions on Form 1040 because it did not display compliance with 44 U.S.C. §§ 3506(c)(1)(B)(1995) or 3512(a)(ii).

On April 13, 2005, Petitioner timely made request for a Collection Due Process ("CDP") Hearing taking issue with the claims of interest and penalties, raising the protection provided by 44 U.S.C. § 3512(1995).

At issue in the Notice of Levy were taxes, interest and penalty claims by the Commissioner against the property belonging to Petitioner for years ending 1999, 2001 and 2002.

On October 6, 005, the Internal Revenue Service issued a Notice of Determination to Petitioner dismissing his Paperwork Reduction Act of 1995 claims regarding non compliance with the Internal Revenue Service's request Form 1040 in response to Petitioner's Collection Due Process Hearing claims. Appendix 1

Petitioner timely appealed the Determination to the United States Tax Court pursuant to 26 U.S.C. § 6330(d), the Commissioner moved to dismiss on Summary Judgment grounds and on October 10, 2006, the United States Tax Court Granted Summary Judgement in favor of the Commissioner over Petitioner's objections. Appendix 9

Petitioner timely appealed to the United States Court of Appeals for the Eleventh Circuit and on May 18, 2007, a Panel issued an Order summarily affirming the Tax Court's decision without any explanation. Appendix 11

Petitioner timely petitioned for rehearing and on July 9, 2007, Petitioner was denied both rehearing and rehearing en banc. Appendix 12

None of the decisions entered by the IRS in their Determination, the Tax Court in its Memorandum or Order, or in the Panel orders does the words Paperwork Reduction Act of 1995 appear in mention, discussion, or suggestion.

This Petition is timely.

REASONS SUPPORTING GRANTING OF WRIT

1. **Does the Internal Revenue Service have to display compliance with the Paperwork Reduction Act of 1995 on all of its request for income tax information forms pursuant to 44 U.S.C. § 3506(c)(1)(B) before it can subject a Taxpayer to any penalty for failure to timely provide answers to the questions sought on a particular form?**

The Paperwork Reduction Act of 1995 directs:

(a) Notwithstanding any other provision of law, **no person shall be subject to any penalty** for failing **to comply with a collection** of information that is subject to this subchapter if

(1) the collection of information does not display a valid control number assigned by the Director in accordance with this subchapter; or

(2) the agency fails to inform the person who is to respond to the collection of information that such person is not required to respond to the collection of information unless it displays a valid control number.

(b) **The protection provided by this section may be raised** in the form of a complete defense, bar, or otherwise **at any time during the agency administrative process or judicial action applicable thereto**.

App. 32; See 44 U.S.C. § 3512. See also, *Pond v. CIR*, T.C. Memo 2005-255, WL 18928 decided 10911-02 (10th Cir.,1-4-07)(unpublished)

In *Dole v. United Steelworkers*, 494 U.S. 26 (1990) the Supreme Court directed the meaning and reach of the PRA of 1980 by saying:

> "While the grammar of this text can be faulted, its meaning is clear: **the public is protected under the Paperwork Reduction Act** from paperwork regulations not issued in compliance with the Act, only when those regulations dictate that a person maintain information for an agency or provide information to an agency. **By its very terms, the statute's enforcement mechanism** does not apply to rules which require disclosure to a third party rather than to a federal agency."

Id. at 40

This Court also held "tax forms" were "typical information collection requests" subject to the Paperwork Reduction Act. Id. at 32-33 See also *USA v. Chisum*, 06-7082 at 12 (slip op.)(decided 9-26-07)(10th Cir.)

44 U.S.C. § 3506(c)(1)(B) states the Director

ensure all requests for information comply with the law. The request Form 1040 does not comply. All requests are mandated by Congress to be:

> (i) inventoried, displays a control number and, if appropriate, an expiration date;
> (ii) indicate the collection is in accordance with the clearance requirements of section 3507; and;
> (iii) informs the person receiving the collection of information of;
> (I) the reasons the information is being collected;
> (II) the way such information is to be used;
> (III) an estimate, to the extent practicable, of the burden of the collection;
> (IV) whether the responses to the collection of information are voluntary, required to obtain a benefit, or mandatory; and
> (V) the fact that an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number

See 3506(c)(1)(B).

The Commissioner writes in instruction booklets every year that "you are not required to provide information on a form subject to the Paperwork

Reduction Act unless the form displays a valid OMB control number."

The Tax Court decision refused to address the Paperwork Reduction Act of 1995 claims of protection made by Petitioner finding them to be frivolous.

The Tax Court is obviously incorrect and the Panel refused to address the erroneous errors made by the Tax Court decision to uphold the interest and penalty claims made by the Commissioner in violation of the Paperwork Reduction Act of 1995.

2. **Is the holding by the United States Court of Appeals for the Eleventh Circuit in *U.S. v. Neff*, 954 F. 2d 698, 699-700 (11th Cir. 1992) contrary to this Court's decision in *Dole v. United Steelworkers*, 494 U.S. 26 (1990) which held typical information collection requests such as Form 1040 are subject to the protection of the Paperwork Reduction Act?**

In *Dole v. United Steelworkers*, 494 U.S. 26 (1990) the Supreme Court directed the meaning and reach of the PRA of 1980 by saying:

> "While the grammar of this text can be faulted, its meaning is clear: **the public is protected under the Paperwork Reduction Act .... By its very terms, the statute's enforcement mechanism** does not apply to rules which require

> disclosure to a third party rather than to a federal agency."

Id. at 40

This Court held in Dole "tax forms" were "typical information collection requests" subject to the Paperwork Reduction Act. Id. at 32-33

In *U.S. v. Neff*, 954 F.2d 698 (11th Cir. 1992) the Panel in that case held:

> "We state only the most obvious reason for rejecting Neff's claim. Congress created Neff's duty to file the Returns in 26 U.S.C. § 6012(a), and nowhere did Congress condition this duty on any Treasury regulation. See United States v. Wunder, 919 F.2d 34, 38 (6th Cir. 1990). Congress did not enact the PRA's public protection provision to allow OMB to abrogate any duty imposed by Congress. See Dole, 494 U.S. at 32-33, 110 S.Ct. at 933; United States v. Hicks, 947 F.2d 1356, 1359-60 (9th Cir. 1991); Wunder, 919 F.2d at 38. So the PRA provides Neff no refuge from his statutorily-imposed duty to file income tax returns."

The Neff court cites to the same page 32-33 which this Court held tax forms were typical information collection requests. In Dole at footnote #

4 this Court said:

> "Tax and business records are examples of information provided only indirectly to an agency. In these cases, the governing regulations do not require records to be sent to the agency; they require only that records be kept on hand for possible examination as part of a compliance review"

Petitioner can find no words on either page 32 or 33 of the Dole decision to support the claims made by the Panel in Neff. Petitioner is unable to find any place in Dole where this Court said the duty to answer questions is a required by statute and not conditioned on any treasury regulations.

This Court has said every time the issue comes up that the requirement to answer questions on an income tax return such as the Form 1040 is imposed by regulation. See *CIR v. Lane-Wells Co.*, 321 U.S. 219, 223 (1944)(Congress has given discretion to the Commissioner to prescribe **by regulation forms** of returns and has made it the duty of the taxpayer to comply); see also *U.S. v. Hubbell*, 530 U.S. 27, 35 (2000)(incriminating evidence may be the by-product of obedience to a ***regulatory requirement***, such as

filing an income tax return); See also *Cheek v. U.S.*, 498 U.S. 192, 199-200 (1991) (holding proliferation of statutes and "regulations" make it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws)

In *Otte v. U.S.*, 419 U.S. 43, 52 (1974) this Court held that:

> Sections 6001 and 6011 require every person responsible for payment or collection of taxes to keep such records and make such returns as the Secretary prescribes.

In Neff, the Panel held it was Congress who "created Neff's duty to file the Returns in 26 U.S.C. § 6012(a), and nowhere did Congress condition this duty on any Treasury regulation."

This Court and the United States Court of Appeals for the Eleventh Circuit[1] are in opposition to one another on whether the requirement to answer questions on Form 1040 originates from some specific provision or whether the Secretary prescribes the request via regulations.

---

[1]And, would appear other Circuits as well.

3. **If the Internal Revenue Service does not comply with the Paperwork Reduction Act of 1995 and a person raised the protection provided by 44 U.S.C. § 3512(b)(1995) in an administrative hearing and on appeal from the determination of that hearing, is it s a frivolous claim of protection and not worthy of "somber reasoning and copious citation of precedent"?**

In 1998, Congress enacted RRA 1998, Public Law 105-206, referring to this enactment as the Internal Revenue Restructuring and Reform Act of 1998. This enactment amended the 1986 Code. See Section 1. Section 3000 labeled "Taxpayer Bill of Rights" and added Section 3001 labeled "Burden of Proof which Congress codified at 26 U.S.C. § 7491 which reads:

> (a) General rule-
> (c) penalties.--Notwithstanding any other provision of this title, the Secretary shall have the burden of production in any court proceeding with respect to the liability of any individual for any penalty, addition to tax, or additional amount imposed by this title.

The House Conference Report 105-599, at 241 (1998), 1998-3 C.B. 747, 995 directs the obligations of the Commissioner and a taxpayer under section

7491(c) as follows:

> "Further, the provision provides that, in any court proceeding, the Secretary must initially come forward with evidence that it is appropriate to apply a particular penalty to the taxpayer before the court can impose the penalty. This provision is not intended to require the Secretary to introduce evidence of elements such as reasonable cause or substantial authority. Rather, the Secretary must come forward initially with evidence regarding the appropriateness of applying a particular penalty to the taxpayer; if the taxpayer believes that, because of reasonable cause, substantial authority, or a similar provision, it is inappropriate to impose the penalty, it is the taxpayer's responsibility (and not the Secretary's obligation) to raise those issues. [H. Conf. Rept. 105-599, *supra* at 241, 1998-3 C.B. at 995.]

No person can be subjected to any penalty and they can raise the protection to keep from being subject to penalty at any time. Petitioner was seeking the protection during the "agency administrative process or judicial action applicable thereto" and the IRS refused to consider Petitioner's

claims as frivolous. In *Pond*, the Tax Court said Pond's claims regarding the protection the PRA provides was frivolous.. However, the Panel at the Tenth Circuit in Pond held the protection claims were not frivolous.[2] *Pond* at 3; See also Chisum at 12

Petitioner, in an administrative dispute with the IRS involving a CDP hearing stemming from a Levy action instigated by the IRS and the Tax Court and Commissioner argue the protection cannot be raised and is frivolous.

The Levy asserts the kind of tax is 1040.[3] The Tenth Circuit explained:

> "In *United States v. Tedder*, 787 F.2d 540, 542 (10th Cir. 1986), this court held that tax forms were not information collection requests subject to the Paperwork Reduction Act because the filing of income tax returns was obligatory. **This holding is superseded by the Supreme Court's analysis in Dole v. United**

---

[2]Pond did not tender a Form 1040 for the years in question in that case and the Panel in Pond said they could not render a decision on whether the Form complied.

[3]Petitioner could not find this kind of tax anywhere in the code or judicial decisions.

> **Steelworkers, ___ U.S. ___, 110 S.Ct. 929, 933, 108 L.Ed.2d 23 (1990), which included federal income tax forms within the category of information collection requests under the Act. Dole would also appear to call into question the holdings in *Snyder v. IRS*, 596 F. Supp. 240 (N.D.Ind. 1984) and *Cameron v. IRS*, 593 F. Supp. 1540 (N.D.Ind. 1984), aff'd 773 F.2d 126 (7th Cir. 1985), both of which held the Paperwork Reduction Act inapplicable to IRS forms**. However, Dole does not contravene our recent holding in Lonsdale v. United States, 919 F.2d 1440, 1444 (10th Cir. 1990) that IRS summonses do not constitute information requests under the Act because they are issued in the course of an investigation directed against a specific individual or entity. See 44 U.S.C. § 3518(c)(1)(B)(ii)"

See *U.S. v. Collins*, 920 F.2d at 630 n.12(10th 1990)

The decision by the Tax Court affirmed by the Panel leaves no remedy for any Citizen to demand the IRS comply with Federal Law administratively regarding Collection Due Process without suffering and being subject to illegal conduct as well as being subject to penalties during the administrative action.

Raising the protection cannot be frivolous even if the Court eventually rules the Form 1040 contains all

of the criteria required by 44 U.S.C. §§§ 3506(c)(1)(B), 3507 and 3512 to which it is obvious to everyone who considers the issue that the request Form 1040 for 1999, 2001 and 2002 does not comply whatsoever. The Paperwork Reduction Act claims by Petitioner deserve "somber reasoning and copious citation of precedent" especially when the Tax Court is to impose even more penalties for such claims.

Currently, Petitioner stands penalized, as being frivolous regarding the Paperwork Reduction Act violations by the Commissioner, without any explanation what warrants upholding the Commissioner's claims of penalties nor any explanation upholding the Tax Court penalties under section 6673. Likewise, Petitioner has no explanation by the Panel why the decision to penalize Petitioner for failure to provide information warranted all the penalties the Paperwork Reduction Act was enacted to prohibit.

4. **Is raising the protection provided by 44 U.S.C. § 3512(b)(1995) against claims of subjecting Petitioner to additional penalties for failure to comply with requests made by the Internal Revenue Service on Form 1040, a claim**

**justifying imposition by the United States Tax Court of even more penalties in the amount of $ 10,000 pursuant to 26 U.S.C. § 6673?**

44 U.S.C. § 3502(14) defines the term penalty applicable to the Paperwork Reduction Act of 1995:

> "includes the imposition by an agency or court of a fine or other punishment; a judgment for monetary damages or equitable relief; or the revocation, suspension, reduction, or denial of a license, privilege, right, grant, or benefit."

26 U.S.C. § 6673 states that when a proceeding has been instituted or maintained for the purpose of delay, the taxpayer's position is frivolous, or failed to pursue administrative remedies, "the Tax Court may require the taxpayer to pay to the United States a penalty not in excess of $ 25,000.00.

There can be no doubt the penalty imposed by the Tax Court and upheld by the decision of the Panel at the United States Court of Appeals, in the amount of $ 10,000.00 is a penalty "by a Court" and subject to the Paperwork Reduction Act of 1995.

The entire reason for its imposition is that the Tax Court, without saying, held Petitioner's Paperwork

Reduction Act defense raised under section 3512 to the Commissioner's claims of interest and penalties[4] was frivolous. No citation to any decision by any Court for its position because it said to cite to such cases would with "somber reasoning and copious citation of precedent" somehow give the Paperwork Reduction Act more attention than the Tax Court and Commissioner believes it deserves.

The Panel summarily affirmed the Tax Court without explanation.

## 5. CONCLUSION

Petitioner respectfully request the Supreme Court of the United States issue a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit to review and determine that (1) the request Form 1040 for Calender Year 1999, 2001 and 2002, is subject to the Paperwork Reduction Act of 1995, and its protections, both administratively, in Tax Court, and (2) in regard to any appeal therefrom, any claims in regard to the Paperwork Reduction Act are not

---

[4]fine or other punishment; a judgment for monetary damages

frivolous and must be addressed by the Commissioner and Tax Court pursuant to 26 U.S.C. § 7491(c), and that any penalty imposed under 26 U.S.C. § 6673 is a penalty subject to the Paperwork Reduction Act of 1995; and to reverse the Tax Court decision upholding the penalties and imposing additional penalties under section 6673 in the amount of $ 10,000.00.

Respectfully Submitted

October 5, 2007 John N. Sweeney

**Internal Revenue Service**

**Department of the Treasury**

Campus Appeals Office
M/S 55201
**Person to Contact:**
5045 E. Butler
Valerie Chavez
Fresno, CA 93727-5136
Employee ID Number: 78-00166

Tel: 559-452-3074
Fax: 559-456-5997
Date: OCT 06 2005
Contact Hours: 8:00AM-3:00PM

**Refer Reply to:**

AP:CO:FRC:VCC
JOHN N SWEENEY
**SSN/EIN Number:**
C/O 8184 BELFORD WAY
213-70-9951
MELBORNE FL 32940
**Tax Type/Form Number:**
Income/1040

**In Re:**
Collection Due Process Hearing
(Tax Court)

Tax Period(s) Ended:
12/1999 12/2001 12/1002

**Certified Mail**

**NOTICE OF DETERMINATION CONCERNING COLLECTION ACTION(S) UNDER SECTION 6320 and/or 6330**

Dear Mr. Sweeney:

We have reviewed the taken or proposed collection action for the period(s) shown above. This letter is your Notice of Determination, as required by law. A summary of our determination is stated below. The attached statement shows, in detail, the matters we considered at your Appeals hearing and our conclusions about them.

If you want to dispute this determination in court, you must file a petition with the United States Tax Court for a redetermination within 30 days from the date of this
letter.

To get a petition form and the rules for filing a petition, write to: Clerk, United States Tax Court, 400 Second Street, NW, Washington, D.C. 20217, or access the Tax Court website at www.ustaxcourt.gov.

The Tax Court has a simplified procedure for an appeal under section 6330(d)(1)(A) of a determination in which the unpaid tax does not exceed $50,000. You can also get information about this procedure by writing to the Tax Court, or accessing the Tax Court website at www.ustaxcourt.gov.

The time limit for filing your petition is fixed by law. The courts cannot consider your case if you file late. If the court determines that you file your petition with the wrong court, you will have 30 days after such determination to file with the correct court.

If you do not petition the court within the time frame provided by law, your case will be returned to the originating IRS office for action consistent with the determination summarized below and described on the attached page(s).

If you have any questions, please contact the person whose name and telephone number are shown above.

**Summary of Determination**

We have determined that the Final Notice – Notice of Intent to Levy was appropriate under the circumstances. Your case will be returned to Compliance. You may voluntarily pay the tax or the Service may proceed with the proposed levy to collect the tax.

Sincerely,
James M. Urner
Appeals Team Manager

**Atachment:** ***Notice of Determination***

**Taxpayer:** ***John Sweeney***

***213-70-9951***

Before the taxpayer decides to petition this notice of determination, the taxpayer should know that the Tax Court is empowered to impose monetary sanctions up to $25,000 for instituting or maintaining an action before it primarily for delay or for taking a position that is frivolous or groundless. Pierson v. Commissioner, 115 T.C. No. 39 (2000). It is our view that the positions the taxpayer has taken have no merit and are groundless.

| Type of Tax(es) | Tax Period(s) | Date of the CDP Notice | Date of the CDP Request |
|---|---|---|---|
| 1040 | 12/1999 | 03/28/05 | 04/13/05 |
| 1040 | 12/2000 | 03/28/05 | 04/13/05 |
| 1040 | 12/2002 | 03/28/05 | 04/13/05 |

Letter 1058 (LT11), Final Notice – Notice of Intent to Levy and Notice of Your Right to a Hearing (Final Notice), was issued on March 28, 2005. Form 12153, Request for a Collection Due Process Hearing, was timely submitted on April 13, 2005.

**SUMMARY AND RECOMMENDATION**

Issuance of the Final Notice is sustained. The taxpayer failed to respond to the IRS's attempts to collect the balance owed and made no offers of collection alternative during the Appeals process.

The taxpayer was scheduled a telephone hearing with Settlement Officer, William O'Neill on August 17, 2005 at 3:00 PM, Pacific Daylight Standard Time (PSDT). The taxpayer did not call Mr. O'Neill for the scheduled hearing appointment; therefore, the case will be returned for Compliance for appropriate action

**BRIEF BACKGROUND**

This Appeals employee has had no prior involvement with this taxpayer with respect to these liabilities in either Compliance or Appeals.

In our letter dated July 25, 2005, a telephone hearing was scheduled with Settlement Officer, William O'Neill on August 17, 2005 at 3:00 PM, Pacific Daylight Standard Time (PSDT). The taxpayer did not cal Mr. O'Neill at the scheduled time for his hearing.

After the hearing date, the taxpayer mailed us a letter postmarked September 7, 2005, and received by the Appeals Office on September 16, 2005. The letter contains no relevant issues pertaining to the levy, no non- frivolous arguments, nor mention of any collection alternatives. Therefore, we made our decision based upon the information in the file and computer transcripts of his account history.

The case will be returned to Compliance for appropriate action.

**Verification of Applicable Legal and Administrative Procedures**

To the best of our knowledge, with the information

available to us, we have determined that Compliance followed all legal and procedural requirements and the actions taken or proposed were appropriate under the circumstances.

Assessments were made and notice and demand for payment of the taxes under IRC §6303(a) were sent to the taxpayer's last known address, along with Publication 1, Your Rights as a Taxpayer. The taxpayer neglected or refused to pay the tax; per IRC §6321, a lien in favor of the United States upon all property and rights to property was created.

Letter 1058 (LT11), Final Notice, Notice of Intent to Levy and Notice of Your Right to a Hearing, was sent to the taxpayer, along with Publication 594, Understanding the Collection Process, in accordance with IRC §6330(d).
The taxpayer was given the opportunity to raise any relevant issue relating tot the unpaid tax or the proposed levy at a hearing in accordance with IRC § 6330(c).

The statute for collection has been suspended since April 13, 2005 while this appeal has been pending.

**Issues Raised by the Taxpayer**

The taxpayer stated on his request for a hearing, issues that are not relative to the levy but questions the Internal Revenue Services' authority to make him liable for income taxes. His response postmarked September 7, 2005, contained arguments that consisted of items the court has determined frivolous or groundless; he did not state

any relevant issues or offer any collection alternatives. The taxpayer did not correspond with any non-frivolous issues

**Challenges to the Existence or Amount of the Liability**

Because the taxpayer previously had an opportunity to challenge the liability, he may not do so again through this hearing. In my letter dated July 25, 2005, I
provided him a Publication 3598 Audit Reconsideration Process, so he may resolve his liability issue.

**Challenges to the Appropriateness of the Proposed Collection Action**

Although the taxpayer challenges the proposed collection action, he did not propose any collection alternatives during the appeals process, even though he had an opportunity at this scheduled hearing appointment on August 17, 2005.

**Collection Alternatives Offered by the Taxpayer**

The taxpayer's response postmarked September 7, 2005, offered no viable alternative to the proposed enforcement action.

**Balancing Efficient Tax Collection and Intrusiveness**

Per IRC §6330(c)(3)(C), the determination by Appeals under this subsection shall take into consideration whether any proposed collection

action balances the
need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary. In this case, the
taxpayer's concern that the actions of the Compliance Division are unduly intrusive was weighed against the Service's responsibility to apply the tax law fairly to all. Issuance of a levy always creates hardship for the taxpayer and is always intrusive. Even so, levy is sometimes necessary to collect the tax in the
most efficient manner and/or to secure the Internal Revenue Service's equity position in assets.

**Issuance of the Final Notice – Notice of Intent to Levy is sustained.**

T.C. Memo. 2006-213
UNITED STATES TAX COURT

JOHN N. SWEENEY,

Petitioner
v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

Docket No. 21167-05L. Filed October 3, 2006.

John N. Sweeney, pro se.
Monica J. Miller, for respondent.

MEMORANDUM OPINION

WELLS, Judge: The instant case is before the Court on respondent's motion for summary judgment pursuant to Rule 1211 and to impose a penalty pursuant to section 6673. The issue we [page 1][1] must decide is whether respondent's Appeals Office abused its discretion in determining to proceed with collection of petitioner's tax liability for taxable years

---

[1]1Unless otherwise indicated, all Rule references are to the Tax Court Rules of Practice and Procedure, and all section references are to the Internal Revenue Code.

1999, 2001, and 2002. For the reasons stated below, we shall grant respondent's motion for summary judgment and to impose a penalty pursuant to section 6673.

Background

At the time of filing the petition in the instant case, petitioner resided in Melbourne, Florida. Petitioner failed to file Federal income tax returns or pay tax for taxable years 1999 through 2003. Respondent sent petitioner a notice of deficiency for each year. Petitioner petitioned this Court regarding taxable year 2003. That case is at docket No. 14262-05 Petitioner failed to petition this Court regarding any other taxable years, and accordingly, respondent assessed deficiencies plus section 6651(a)(1) and 6654(a) additions to tax and interest for taxable years 1999, 2001, and 2002. Petitioner's current liabilities, including interest through the trial date of October 16, 2006, for the years in issue are $38,324.42, $66,315.10, and $72,286.30, respectively.

On March 28, 2005, respondent sent petitioner a Letter 1058, Final Notice of Intent to Levy and Notice of Your Right to a Hearing, with respect to the years in

issue in the instant case.[page2] [2] On April 19, 2005, petitioner sent respondent a Form 12153, Request for a Collection Due Process Hearing.

Respondent's Appeals officer reviewed petitioner's correspondence and determined that all of petitioner's contentions were frivolous. On July 25, 2005, respondent's Appeals officer sent petitioner a letter in which respondent notified petitioner that respondent had received petitioner's request for a section 6330 hearing and scheduled a telephone conference for August 17, 2005, at 3 p.m. The letter advised petitioner that the underlying liabilities could not be raised at the hearing because petitioner had received statutory notices of deficiency.2 Respondent's letter also directed petitioner to an Internal Revenue Service (IRS) publication, "The Truth About Frivolous Tax Arguments", available on the IRS's Web site. Finally, the letter advised petitioner of this Court's authority to impose a sanction of up to $25,000 pursuant to section 6673.

---

[2]Petitioner denies receiving a statutory notice of deficiency. However, this is only because petitioner claims to have received "non-statutory" notices of deficiency Accordingly, the fact of receipt is deemed conceded

Petitioner did not respond to this letter and failed to participate in the scheduled phone conference. On August 22, 2005, respondent sent petitioner a letter again requesting that petitioner contact respondent and provide any additional [page 3] information petitioner wished to have considered in the hearing. The letter requested a response by September 7, 2005.

On September 13, 2005, petitioner sent respondent a letter captioned "LEGAL NOTICE", in which petitioner asserted only frivolous arguments. Petitioner also sent a second letter containing frivolous arguments. All of the arguments petitioner raised in those letters were also raised in the 12-page amended petition filed with this Court in petitioner's deficiency case at docket No. 14262-05. On October 6, 2005, this Court struck, sua sponte, paragraphs 5 through 50 and 78 through 139 of the petition in that case as frivolous and advised petitioner regarding section 6673(a)(1).

Based on the administrative file and correspondence, respondent's Appeals officer determined that the proposed levy was appropriate and sent petitioner a notice of determination.

Petitioner timely petitioned this Court pursuant to section 6330. Petitioner's lengthy petition and reply to respondent's answer raise only frivolous arguments. Respondent filed a motion for summary judgment and to impose a penalty pursuant to section 6673 on August 18, 2006.

Discussion

Summary judgment is intended to expedite litigation and avoid unnecessary and expensive trials and may be granted where [page 4] there is no genuine issue of material fact and a decision may be rendered as a matter of law. Rule 121(a) and (b); Fla. Peach Corp. v. Commissioner, 90 T.C. 678, 681 (1988). The moving party bears the burden of proving that there is no genuine issue of material fact, and factual inferences are viewed in a light most favorable to the nonmoving party. Craig v. Commissioner, 119 T.C. 252, 260 (2002); Dahlstrom v. Commissioner, 85 T.C. 812, 821 (1985); Jacklin v. Commissioner, 79 T.C. 340, 344 (1982). The party opposing summary judgment must set forth specific facts that show a genuine question of material fact exists and may not rely merely on allegations or denials in the pleadings. Grant Creek Water Works, Ltd. v. Commissioner, 91 T.C. 322, 325

(1988); Casanova Co. v. Commissioner, 87 T.C. 214, 217 (1986).

Section 6330 provides that no levy may be made on any property or right to property of a person unless the Secretary first notifies him or her in writing of the right to a hearing before the Appeals Office. The Appeals officer must verify at the hearing that the applicable laws and administrative procedures have been followed. Sec. 6330(c)(1). At the hearing, the person may raise any relevant issues relating to the unpaid tax or the proposed levy, including appropriate spousal defenses, challenges to the appropriateness of collection actions, and collection alternatives. Sec. 6330(c)(2)(A). The person may challenge the existence or amount of the underlying tax, however, [page 5] only if he or she did not receive any statutory notice of deficiency for the tax liability or did not otherwise have an opportunity to dispute the tax liability. Sec. 6330(c)(2)(B).

Where the validity of the underlying tax liability is properly in issue, the Court will review the matter de novo. Where the validity of the underlying tax is not properly at issue, however, the Court will review the Commissioner's administrative determination for

abuse of discretion. Sego v. Commissioner, 114 T.C. 604, 610 (2000); Goza v. Commissioner, 114 T.C. 176, 181-182 (2000).

Petitioner had the opportunity to challenge the correctness of his tax liability for 1999, 2001, and 2002 but instead chose not to petition this Court in response to the notices of deficiency regarding those years. Therefore, petitioner's underlying tax liability for 1999, 2001, and 2002 is not properly in issue, and we review respondent's determination to proceed with collection for an abuse of discretion.

The record demonstrates that the only issues petitioner raised throughout the section 6330 administrative process and in his petition to this Court were frivolous tax protester type arguments. We do not address petitioner's frivolous arguments with somber reasoning and copious citations of precedent, as to do so might suggest that these arguments possess some degree of [page 6] colorable merit. See Crain v. Commissioner, 737 F.2d 1417, 1417 (5th Cir. 1984).

The record in the instant case demonstrates that respondent's Appeals officer was impartial, had no prior involvement with petitioner, and verified that

all applicable laws and administrative procedures were followed. Accordingly, we hold that respondent's determination to proceed with the proposed levy to collect petitioner's tax liability for 1999, 2001, and 2002 was not an abuse of discretion and that no genuine issue of material fact exists requiring trial. Respondent is entitled to summary judgment.

Section 6673(a)(1) provides that this Court may require the taxpayer to pay a penalty not in excess of $25,000 whenever it appears to this Court: (a) The proceedings were instituted or maintained by the taxpayer primarily for delay; (b) the taxpayer's position is frivolous or groundless; or (c) the taxpayer unreasonably failed to pursue available administrative remedies. Respondent has moved that the Court impose a penalty in the instant case. The record indicates that petitioner was warned that this Court could impose a penalty if he persisted in raising frivolous tax protester arguments. Despite being warned, petitioner raised frivolous arguments throughout the section 6330 administrative process, in his petition to this Court, in his [page 7] reply to respondent's answer, and in his response to

respondent's motion for summary judgment. Accordingly, we shall impose a $10,000 penalty on petitioner pursuant to section 6673. To reflect the foregoing, An appropriate order and decision will be entered. [page 8]

UNITED STATES TAX COURT
WASHINGTON, D. C. 20217

JOHN N. SWEENEY,

Petitioner

v. Docket No. 21167-05L

CIR,

Respondent

**ORDER AND DECISION**

Pursuant to the opinion of the court as set forth in T.C. Memo. 2006-213, filed October 3, 2006, it is

ORDERED that respondent's Motion for Summary Judgment And For Damages Under I.R.C. § 6673, is granted. It is further

ORDERED and DECIDED that respondent may proceed with collection as set forth in the Notice of Determination Concerning Collections Action(s) Under Section 6320 and/or 6330 dated October 6, 2005, issued with respect to petitioner's taxable years 1999, 2001, and 2002. It is further

ORDERED and DECIDED that pursuant to section 6673(a) petitioner shall pay a penalty in the amount of $10,000.

(signed) Thomas B. Wells

Thomas B. Wells
Judge

ENTERED: OCTOBER 10, 2006

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MAY 18, 2007

07-10225-GG

JOHN N. SWEENEY,

Petitioner-Appellant,

versus

COMMISSIONER OF IRS,

Respondent-Appellee

On Appeal from a Final Order of the United States Tax Court

BEFORE: TJOFLAT, ANDERSON, and HULL, Circuit Judges

BY THE COURT:

Appellant's "Motion to Set Aside Dismissal" is GRANTED. Appellant's "Motion to Supplement the Record" is DENIED.

Appellee's motion pursuant to 26 U.S.C. § 6330(e)(2) to permit levy pending appeal is GRANTED.

Appellee's motion for "summary affirmance," construed as a motion to dismiss the appeal as frivolous and entirely without merit pursuant to 11th Cir. R. 42-4, is GRANTED. The Clerk is directed to close the file on this appeal.

IN THE UNITED STATES TAX COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

07-10225-GG

JOHN N. SWEENEY,

JULY 9 2007

Petitioner-Appellant,

v.

COMMISSIONER OF IRS,

Respondent-Appellee
On Appeal from a Final Order of the United States Tax Court

BEFORE: TJOFLAT, ANERSON, and HULL, Circuit Judges

BY THE COURT:

Now before the Court are Appellant's "Motion to Recall Mandate Pending Petition for Rehearing or Rehearing En Banc," as well as a "Petition for Rehearing or Rehearing En Banc"; these are together construed as a motion for reconsideration of the Court's May 18, 2007, order dismissing this appeal as frivolous and as a request to submit the motion for reconsideration to the full Court.

Reconsideration of the Court's ruling on a motion to dismiss is considered an administrative matter which is not subject to en banc consideration.

See 11th Cir. R. 35-4. Appellant's request that his motion for reconsideration be submitted to the full Court is therefore DENIED.

Appellant's motion for reconsideration of our order granting Appellee's motion to dismiss this appeal as frivolous is DENIED.

87

07-865

FILED
MAR 13 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

*In the*

SUPREME COURT OF THE UNITED STATES

---

John N. Sweeney

*Petitioner,*

v.

Commissioner of Internal Revenue

*Respondent.*

---

On Petition for Writ of Certiorari
to the United States Court of Appeals for
the Eleventh Circuit

---

# PETITION FOR REHEARING

---

John N. Sweeney
8184 Belford Way
Melbourne, Florida 32940
321-253-2918

TABLE OF CONTENTS

INTRODUCTION . . . . . 1

1. The United States is continuing to advance knowingly conflicting theories regarding the requirement to provide information to the IRS on Form 1040, before this very Court, opposing other theories the same United States is knowingly advancing while they are before other Circuits and even lower District Courts with the Eleventh Circuit . 3

CONCLUSION . . . . . 17

CERTIFICATE OF PETITIONER . . . . . 19

ADDENDUM

Example of United States Argument . . . . . ADD.1

TABLE OF AUTHORITIES -continued

CIR v. Lane Wells Co. 321, U.S. 219, 223 (1944) 4

Dole v. U. Steelworkers, 494 U.S. 26,33 (1990) 1,5,7

Pond v. CIR, 2005-255 WL 18928(1-4-07)(10th) 12

Salberg v. U.S., 969 F.2d 379, 384(7th. 1992) . 4,15

U.S. v. Chisum, 06-7082 at 12 (slip)(10th.2007) . 8

U.S. v. Clayton, 07-904 (response brief) . . . . . 3

U.S. v. Collins, 920 F.2d 619 (10th Cir. 1990) . 9,12

U.S. v. Dawes, 951 F.2d 1189(10th Cir. 1991) . . 14

U.S. v. Hicks, 947 F. 2d 1356, 1359-60(9th 1991) 14

U.S. v. Hubbell, 530 U.S. 27, 35 (2000) . . . . . 5

U.S. v. Patridge, 06-3635(11-14-07)(7th.) . . . . 4,15

U.S. v. Priest, et al., 06-10438 (9th.Cir.2007) . . . . 4

U.S. v. Tedder, 787 F.2d 540, 542 (10th Cir. 1986) 9

Wolcott v. CIR, T.C. Memo. 2007-315. (fn.8) . . 13

STATUTES

26 U.S.C.§ 6011 . . . . . 16

26 U.S.C.§ 6012 . . . . . 3

26 U.S.C.§ 7203 . . . . . 4,14,15,16

44 U.S.C.§ 3512 . . . . . 1,4,5,8,13

5 CFR § 1320 . . . . . 16

## INTRODUCTION

Petitioner asks this Court to reconsider the holding in *Dole v. United Steelworkers*, 494 U.S. 26,33 (1990) that typical information collection requests are tax forms such as the 1040 and reaffirm this holding applies to the Paperwork Reduction Act of 1995 as it did the Act of 1980. Since holding tax forms are subject to the public protection, 44 U.S.C. § 3512(1980), a division of the U.S. Circuit Courts and Tax Court has appeared, both directly after the Dole decision, and now this division has grown to such proportions that the Department of Justice is promoting the divided authority as a green light to continue to disregard Congress and its mandate that all persons are to be told, before they have to answer any questions, orally or in writing, advanced by any Agency, including the Internal Revenue Service, why the Agency is requesting the information sought on their form, how the answers to those questions are intended

to be used, whether the target's response is voluntary or mandatory, and the fact no person is required to answer any question unless the form of questions displays compliance with the Paperwork Reduction Act of 1995(during Dole, 1980).

Even if this Court is unwilling to consider the affect the Paperwork Reduction Act of 1995 has on its 1990 Dole decision, which Congress said was intended to overturn the Dole decision in regard to third party requests not being covered by the 1980 Act's public protection, the fundamental principal that no person should be required to provide answers to questions until that person fully understands the conditions which attach to the usage of those answers must be addressed because there is no way a person can know whether to claim the protection of the Fifth Amendment until such time as the Agency seeking the information has fully disclosed its intentions for the information it seeks.

1. The United States is continuing to advance knowingly conflicting theories regarding the requirement to provide information to the IRS on Form 1040, before this very Court, opposing other theories the same United States is knowingly advancing while they are before other Circuits and even lower District Courts with the Eleventh Circuit.

Recently, on the Solicitor General filed a brief before this Court in United States v. Clayton, 07-904, in which the United States argued:

> "Petitioner suggests in passing (Pet. 18) that the decision below conflicts with *Christensen* v. *Harris County*, 529 U.S. 576 (2000), "by giving to a number calculated by the [Department of Labor] and published only on the Internet and in a few financial newspapers and periodicals the force and effect of law." But as already explained, the decision below does not rest on a determination that the CPI, in and of itself, has the force of law. **What has the force of law is Section 6012**, and it is that statute that required petitioner to file a tax return."

On November 14, 2007, the 7th Circuit Court of Appeals issued its decision in U.S. v. Denny R.

Patridge,507 F.3d 1092, 1094, 1095 (7th Cir. 2007) In its consolidated decision, the 7th Circuit stated it was reaffirming its decision in *Salberg v. U.S.*, 969 F.2d 379, 384 (1991), which held the "obligation to file a tax return stems from 26 U.S.C. § 7203, not from any agency's demand. The Paperwork Reduction Act does not repeal § 7203."

The 9th Circuit in U.S. v. Priest, et al., 06-10438, decided July 5, 2007, likewise concluded that the 1995 PRA "does not limit the impact of Hicks (947 F. 2d 1356, 1359-60) because we there held that 'repeals by implication are not favored.'"

The 7th and 9th Circuit's decision are contrary to this Court's holding in *CIR v. Lane Wells Co.* 321, U.S. 219, 223 (1944) that "Congress has given discretion to the Commissioner to prescribe by regulations forms of returns and made it the duty of the taxpayer to comply." They also conflict with "Notwithstanding any other provision of law" and allow laws to withstand the protection's reach. See 3512(a)(1995)(and 1980).

The 7th and 9th Circuit opinions also are contrary to this Court's decision in *Dole v. United Steelworkers*, 494 U.S. 26, 33 (1990) which held "typical information collection requests include tax forms" and that the public is to be protected.

The 7th and 9th Circuit's opinion is also contrary to this Court's decision in *U.S. v. Hubbell*, 530 U.S. 27, 35 (2000) which held "incriminating evidence may be the by-product of obedience to a regulatory requirement."

The decision by the 7th and 9th Circuits completely rejected the direct words of the Paperwork Reduction Act of 1980 and 1995 which both begin at section 3512 "Not withstanding any other provision of law no person shall be subject to any penalty..." The 7th Circuit admits the term "return" is not defined by any Act of Congress and ignores the logical follow that is the request derives from regulations.

The 7th Circuit takes the leap by saying they have "no doubt that the IRS has complied with

the Paperwork Reduction Act." "The control number on Form 1040 appears on OMB's web site as a current, valid number; if this is wrong, it takes more than a lawyer's say-so to establish the proposition."

The 7th Circuit's position is contrary to the direct language of the Paperwork Reduction Act of 1995 as well as this Court's decision in Dole. The 1995 Act directs a "complete defense, bar, or otherwise" may be raised at any time. The protection would begin upon either a person's "say-so" or upon an Attorney claiming the protection for his client. Look at how the 7th Circuit handled the issue.

It threatened disbarment of the Patridge Attorney for raising the protection. There is no doubt the Form 1040 fails to contain any of the listed criteria promulgated by Congress at 44 U.S.C. § 3506(c)(1)(B)(1995) which among other things directs the Agency to inform the target the reason why the questions are being asked and

how the information is to be used. Issues the Patridge Panel completely ignored.

See also 5 U.S.C. §552(a) where Congress requires the same list of disclosure for the IRS as section 3506(c)(1)(B) of Title 44.

This Court said in Dole:

> "While the grammar of this text can be faulted, its meaning is clear: **the public is protected under the Paperwork Reduction Act** from paperwork regulations not issued in compliance with the Act, only when those regulations dictate that a person maintain information for an agency or provide information to an agency. **By its very terms, the statute's enforcement mechanism** does not apply to rules which require disclosure to a third party rather than to a federal agency." Id. at 40

Furthermore, the Patridge panel said "How any of this could block a conviction for tax evasion is a mystery."

The 10th Circuit has steadfastly remained[1] a strong proponent of the Dole holding with their most recent deposit on the reach of protection for the public in *USA v. Chisum*, 502 F.3d 1237 (10th Cir.2007) The Chisum Panel held:

C. The Paperwork Reduction Act (PRA)

> The PRA, 44 U.S.C. § 3501-20, precludes the imposition of any penalty against a person for "failing to comply with a collection of information" if either (1) it "does not display a valid control number" or (2) the agency fails to alert the person that he or she "is not required to respond to the collection of information unless it displays a valid control number." 44 U.S.C. § 3512(a). A § 3512(a) defense may be raised at any time. See id. § 3512(b). Tax forms are covered by the PRA. See Dole v. United Steelworkers of Am., 494 U.S. 26, 33 (1990).

---

[1]Petitioner understands thus far the Tenth Circuit has actually given no relief under the 1980 or 1995 Act while they continue to direct where and when such relief is to be given.

> Mr. Chisum contends that "[s]ince there was no proof that Form 1040 was a lawful form under the [PRA], the trial court erred in failing to grant [his] request [at the sentencing hearing] to dismiss the indictment." Aplt. Br. at 29. But the PRA protects a person only "for failing to file information. It does not protect one who files information which is false." Collins, 920 F.2d at 630 n.13 (internal quotation marks omitted). The charges against Mr. Chisum were predicated on the filing of false information, not the failure to file. He is therefore not entitled to relief.

In *U.S. v. Collins*, 920 F.2d 619 (10th Cir. 1990) the 10th Circuit, prior to the 7th Circuit's decision in Salberg, stated

> [fn12]In *U.S. v. Tedder*, 787 F.2d 540, 542 (10th Cir. 1986), this court held that tax forms were not information collection requests subject to the Paperwork Reduction Act because the filing of income tax returns was

obligatory. **This holding[2] is superseded by the Supreme Court's analysis in Dole v. United Steelworkers,** ___ U.S. ___, 110 S.Ct. 929, 933, 108 L.Ed.2d 23 (1990), which included federal income tax forms within the category of information collection requests under the Act. Dole would also appear to call into question the holdings in Snyder v. IRS, 596 F. Supp. 240 (N.D.Ind. 1984) and Cameron v. IRS, 593 F. Supp. 1540 (N.D.Ind. 1984), aff'd 773 F.2d 126 (7th Cir. 1985), both of which held the Paperwork Reduction Act inapplicable to IRS forms. However, Dole does not contravene our recent holding in Lonsdale v. U.S., 919 F.2d 1440, 1444 (10th Cir. 1990) that IRS summonses do not constitute information requests under the Act because they are issued in the course of an investigation directed against a specific individual or entity. See 44 U.S.C. § 3518(c)(1)(B)(ii).

[fn13] In U.S. v. Weiss, 914 F.2d 1514, 1520-22 (2d Cir. 1990), the Second Circuit held that the Paperwork

---

[2]No doubt Dole is a "Holding."

Reduction Act did not preclude prosecution for filing false medicare and Medicaid claims, despite the fact that the forms in question did not contain OMB control numbers. Distinguishing Smith, where defendants were prosecuted for failure to file a Plan of Operations with the Forest Service, the Second Circuit reasoned that the Act "`only protects a person from penalties for failing to files information It does not protect one who files information which is false.'" Id. at 1522 (quoting Funk, The Paperwork Reduction Act: Paperwork Reduction Meets Administrative Law, 24 Harv.J. on Legis. 1, 77 n. 411 (1987)) (emphasis in original). We recognize that because defendant was charged with tax evasion and not failure to file tax returns, he technically was not being prosecuted for failure to provide information. Had defendant's tax evasion been effectuated through the filing of falsified tax returns, Weiss would dictate that no Paperwork Reduction Defense would be available to him. **But because the provision of information in 1040 forms is inexorably linked to the statutory requirement to**

**pay taxes, and defendant failed to file such forms, the Paperwork Reduction Act was applicable to such conduct.** Emphasis added.

Petitioner claims the Chisum Panel is partly incorrect. The Chisum Panel nine months earlier held in *Pond v. CIR*, T.C. Memo 2005-255 WL 18928, decided January 4, 2007, Tax Court was wrong for directing Pond, by raising a defense against penalty and interest claims of the Secretary, he was acting in a frivolous manner.

The 7th Circuit in Patridge says it cannot understand how "tax evasion" and the public protection provision of the Paperwork Reduction Act are connected, describing this as a "mystery" while the 10th Circuit says Forms like the 1040 are "inexorably linked to the statutory requirement to pay taxes..." Collins, fn13, Chisum, pg. 12

The 1980 Act at issue in Collins and Dole protected the public from penalties for failing to maintain or provide information while the 1995 Act protects the public from failing to comply

with a collection of information. The 1995 Act also says the OMB number must be issued in "accordance with this chapter" and defense, bar or otherwise, can be raised at any time. Providing the wrong answer is synonymous with failing to comply.

Simply, the decisions show why this Court needs to address the reach of the public protection provided by Congress to the entire Country at 44 U.S.C. § 3512(a)(1995).

Then there is the Tax Court's refusal to accept the 10th Circuit's decision in Pond v. CIR. See *Wolcott v. CIR*, T.C. Memo. 2007-315. (fn.8)[3]

In another argument before the United States District Court for the Northern District of Georgia, in United States v. Jackson, 07-CR-108 ODE, on appeal to the Eleventh Circuit at 08-10651-D, Jackson, a former IRS Agent and CPA, charged with willfully failing to file information, the

---

[3]Can Tax Court really reject the 10th Circuit's decision in Pond and Chisum?

United States and presumably with its Solicitor General on board, told the Honorable Honorable Orinda D. Evans that:

> As the Eleventh Circuit reasoned in United States v. Neff, 954 F.2d 698, 699-700 (11th Cir. 1992), Congress created the defendant's duty to file federal income tax returns; Congress did not enact the Paperwork Reduction Act's "public protection" provision to allow OMB to abrogate any duty imposed by Congress; and so, the Paperwork Reduction Act provides the defendant no refuge for her statutorily-imposed duty to file federal income tax returns or from the imposition of a criminal penalty with a sentence of imprisonment on her conviction for willful failure to do so. See United States v. Dawes, 951 F.2d 1189, 1191-1193 (10th Cir. 1991). The defendant was convicted for non-compliance with the statutory requirement imposed by 26 U.S.C. § 7203, not by any form or regulation. See United States v. Kerwin, 945 F.2d 92 (5th Cir. 1991)(the Paperwork Reduction Act does not apply to the statutory requirement that a taxpayer must file a return). The explicit statutory requirement to file a tax return is not subject to the Paperwork Reduction Act. United States v. Dawes, 951 F.2d at 1191-

> 1192. The Act was not meant to provide criminals with an all purpose escape hatch. United States v. Hicks, 947 F.2d 1356, 1359 (9th Cir. 1991). **In fact, Section 7203 does not require the use of a Form 1040 for a person make a "return" of income. All that is required is a complete and candid return of income. See United States v. Patridge, 507 F.3d 1092, 1094, 1095 (7th Cir. 2007); Salberg v. United States, 969 F.2d 379, 384 (7th Cir. 1992) and the cases cited therein.**

Add. 6-7

This goes to show that the people's representatives have written a law, that intends to protect the public, that is not protecting the public, because Judges in the lower and appellate Courts are being misled by the United States Department of Justice.

As Chief Judge Easterbrook said in Patridge, "For that matter, many tax lawyers (and most judges) could not rattle off the citations without glancing at a book." Supra

Describing an attempt to understand the requirements the "proliferation of statutes and

regulations" made to understand the tax code by "glancing at a book" is ridiculous.

What book did Chief Judge Easterbrook look at in Patridge? You may be able to ascertain "the code" but that is as close as you get. What book did the Solicitor General glance at in Clayton? He does not say. What book does the Commissioner glance at when he writes instructions for his forms? He says "and their regulations" and never mentions section 7203. What about OMB? What book do they get their 5 CFR 1320 "6011" theory" from? They don't say.

Yet, the outcome with regard to the public protection is all the same. No relief. The Chisum Court said the public protection applies to "failing to file information" but not to "filing information which is false." Supra

Soon, Bivens actions will be brought against Government actors for intentionally violating the Paperwork Reduction Act of 1995 and their only defense will be qualified immunity. This immunity will not save their intentional violations of law because they would have to say they knew what

the law said but some Court decisions told them to ignore the law. That will not work under Harlow v. Fitzgerald, 457 U.S. 800, (1982).

When former IRS Agent Jackson followed the Chisum panel and raised the protection, the District Court stated that since Chisum did not get relief for providing information which is false, Jackson does not get relief for failing to file information. That should leave this Court scratching its head.

The relationship between Government and the Public involving gathering information and usage of same is in need of specific uniform enforcement, and to which blatant error of Constitutional proportion exists in the refusal of the U.S. Department of Justice, Commissioner of I.R.S., U.S. Tax Court, U.S. District Court and the several U.S. Court of Appeals, in rejecting both the law, history and decisions governing the Paperwork Work Reduction Act of both 1980,1995, and the reasons both acts arose in the first place.

With many violations comes many cases which can be prevented by granting this Petition for Rehearing.

## CONCLUSION

For the foregoing reasons Petitioner requests[4] this Court to Grant his Petition for Rehearing and fix the means and manner in which the public is protected by the Paperwork Reduction Act with specific uniform finding on the requirement to provide information to the IRS, or any agency, on any Form, and to reject the plethora of statutory origin theories which only prove there is no such theory.

Respectfully Submitted

March 13, 2008 John N. Sweeney

---

[4]Demands is a more fitting term.

## CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Petition for Rehearing is presented in good faith and not for the purpose of any delay, whatsoever, and is limited to substantial and controlling issues involving recent decisions by both the 7th, 9th and 10th Circuit, which were not available[5] to Petitioner at the time his Petition for Writ of Certiorari was filed with this Court and to which divide this nation on the application and reach of the Paperwork Reduction Act of 1995 only strengthening why this Court should Grand this Petition for Rehearing.

/s/John N. Sweeney

---

[5]Save the 9th in Priest

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

| | |
|---|---|
| UNITED STATES OF AMERICA | : February 13, 2008<br>: CRIMINAL ACTION |
| v. | : |
| | : NO. 1:07-CR-108-<br>:ODE |
| SHERRY PEEL JACKSON | : |

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION REGARDING 18 U.S.C. § 4083

Comes now the United States of America, by and through counsel, David E. Nahmias, United States Attorney, and Richard M. Langway, Assistant United States Attorney for the Northern District of Georgia, responding to defendant's motion regarding 18 U.S.C. § 4083 as follows:

1.The defendant's contention that she should not be sentenced to a term of imprisonment or be subjected to any "penalty" on her convictions for violation of Title 26, Section 7203, based on her construction of Title 18, United States Code, Section 4083, and the Paperwork Reduction Act, 44 U.S.C. § 3512, is frivolous. This contention is no more than a repetition of

constructions of the law advanced by federal income tax non-filers convicted for violation of Section 7203, which have been repeatedly rejected by the courts since the 1980's. In particular, the defendant's construction of 18 U.S.C. 4083 was rejected by the court in United States v. Hanyard, 746 F.2d 226, 1229 (5th Cir. 1985). In Hanyard, the defendant contended that 18 U.S.C. § 4083 prohibited his confinement to a federal prison camp. The court rejected that contention, holding that since the purpose of Section 4083, to prohibit confinement of misdemeanants to a penitentiary, was not violated by confining Hanyard to a federal prison camp, the district court did not abuse its discretion by sentencing him to confinement in a federal prison camp even if felons were also housed there. Her contentions relating to 44 U.S.C. § 3512 were rejected in United States v. Neff, 954 F.2d 698, 699-700 (11th Cir. 1992); United States v. Patridge, 507 F.3d 1092, 1094-1095 (7th Cir. 2007); and Salberg v. United States, 969 F.2d 379, 383-384 (7th Cir. 1992).

2. With regard to the maximum term of imprisonment

to which the defendant can be sentenced for her convictions, Title 26, Section 7203, authorizes a maximum term of imprisonment of one year upon conviction for each count of conviction. 26 U.S.C. § 7203, which defines the offense of willful failure to file a federal income tax return as a misdeameanor, does not specifically classify the misdemeanor offense by a letter grade. Title 18, United States Code, Section 3559 - Sentencing classification of offenses - provides that if an offense that is not specifically classified by letter grade in the section defining it, is a Class A misdemeanor if the maximum term of imprisonment authorized is one year or less but more than six months as in the case with a Section 7203 conviction. Title 18, Section 3581 - authorized terms of imprisonment - provides that a defendant who has been found guilty of a Class A misdemeanor may be sentenced to an authorized term of imprisonment of not more than one year.

3. As to the type of institution at which the defendant may be required to serve a sentence of imprisonment, Title 18, United States Code, Section

4083 - Penitentiary Imprisonment; Consent - directed to the Federal Bureau of Prisons - provides that a sentence for a misdemeanor, that is, an offense punishable by imprisonment for one year or less shall, shall not be served in a penitentiary without the consent of the defendant.

4. Accordingly, since the defendant was convicted of four separate misdemeanor offenses for willful failure to file income tax returns under Section 7203, defendant cannot be compelled to serve a sentence of imprisonment imposed by this court in a United States penitentiary, unless she consents. The Federal Bureau of Prisons may, however, designate the defendant to serve her sentence in an institution, other than in a United States Penitentiary, where persons in the custody of the Federal Bureau of Prisons may serve their sentences, such as a Federal Correctional Institution or a Federal Prison Camp, among others, enumerated in 28 C.F.R. § 500.1. See United States v. Hanyard, 762 F.2d 1226, 1228-1229 (5th Cir. 1985).

5. The defendant's contention that the term "penitentiary," for purposes of Title 18, United States Code, Section 4083, applies to any place where felons are placed to serve their time or any place where persons waiting to be sentenced or charged with felonies reside or where persons convicted of felonies currently await transition back into society is without merit. See United States v. Hanyard, 762 F.2d at 1229. As the Hanyard court noted, since the purpose of Section 4083, to prohibit confinement of misdemeanants to a penitentiary, is not violated by confining a defendant to a facility, such as a federal correctional institution or federal prison camp, the district court may properly commit the defendant to the custody of the Bureau of Prisons to be imprisoned at a Federal Bureau of Prisons institution, other than at a United States Penitentiary, on her convictions for violation of 26 U.S.C. § 7203.

6. Likewise, there is no merit to the defendant's suggestion that Paperwork Reduction Act, 44 U.S.C. § 3512, can affect the imposition of a penalty upon convictions for failure to file federal income tax returns

in violation of 26 U.S.C. § 7203, which provides criminal sanctions for failure to do so, because the IRS Forms 1040 do not comply with the Paperwork Reduction Act.

7. Defendant cites no case law that supports the proposition that the failure, if any, of a Form 1040 to display a control number assigned by OMB or expiration date would affect the imposition of a sentence, which includes imprisonment and a fine, by a federal court in a criminal tax case, upon convictions for violating Title 26, United States Code, Section 7203, for willful failure to file federal income tax returns. As the Eleventh Circuit reasoned in United States v. Neff, 954 F.2d 698, 699-700 (11th Cir. 1992), Congress created the defendant's duty to file federal income tax returns; Congress did not enact the Paperwork Reduction Act's "public protection" provision to allow OMB to abrogate any duty imposed by Congress; and so, the Paperwork Reduction Act provides the defendant no refuge for her statutorily-imposed duty to file federal income tax returns or from the imposition of a criminal penalty

with a sentence of imprisonment on her conviction for willful failure to do so. See United States v. Dawes, 951 F.2d 1189, 1191-1193 (10th Cir. 1991). The defendant was convicted for non-compliance with the statutory requirement imposed by 26 U.S.C. § 7203, not by any form or regulation. See United States v. Kerwin, 945 F.2d 92 (5th Cir. 1991)(the Paperwork Reduction Act does not apply to the statutory requirement that a taxpayer must file a return). The explicit statutory requirement to file a tax return is not subject to the Paperwork Reduction Act. United States v. Dawes, 951 F.2d at 1191-1192. The Act was not meant to provide criminals with an all purpose escape hatch. United States v. Hicks, 947 F.2d 1356, 1359 (9th Cir. 1991). In fact, Section 7203 does not require the use of a Form 1040 for a person make a "return" of income. All that is required is a complete and candid return of income. See United States v. Patridge, 507 F.3d 1092, 1094, 1095 (7th Cir. 2007); Salberg v. United States, 969 F.2d 379, 384 (7th Cir. 1992) and the cases cited therein.

8. Finally, the defendant's contention that the Forms

1040 for the years 2000, 2001, 2002, and 2003 failed to contain a "valid" control number and that the forms are invalid because they do not tell taxpayers that the lack of a valid control number means they do not need to supply any information or do not have an expiration date is frivolous. These contentions were addressed and rejected by the courts in United States v. Patridge, 507 F.3d 1092 at 1094-1095, Salberg v. United States, 969 F.2d 379, 383-384 (7th Cir. 1992), and United States v. Dawes, 951 F.2d 1189, 1193. In fact, the Forms 1040 for the years that the defendant failed to file a return bear a control number, namely, OMB No. 1545-0074, and an expiration date - the forms are designated by year, e.g., "2000," etc. Nothing more is required. Id.

Respectfully submitted,

DAVID E. NAHMIAS
UNITED STATES ATTORNEY
/s/RICHARD M. LANGWAY
ASSISTANT UNITED STATES ATTORNEY
600 U.S. Courthouse
75 Spring St., S.W.
Atlanta, GA 30303
(404)581-6035
(404)581-6181 (Fax)
Georgia Bar No. 437050